

NO. COA14-958

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2015

STATE OF NORTH CAROLINA,

v.

Gaston County
No. 04-CRS-57497-98

Victor Lee Turner,
Defendant.

Appeal by Defendant from order entered 21 May 2014 by Judge Jesse B. Caldwell, III in Gaston County Superior Court. Heard in the Court of Appeals on 6 January 2015.

Attorney General Roy Cooper, by Assistant Attorney General Laura Edwards Parker, for the State.

Don Willey for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Victor Lee Turner ("Defendant") appeals from an order denying his motion for postconviction DNA testing pursuant to N.C. Gen. Stat. §§ 15A-267, 268, 269, and 270 (2013). Defendant contends that the trial court erred in (1) denying Defendant's motion for DNA testing, and (2) failing to consider Defendant's request for the appointment of counsel pursuant to N.C. Gen. Stat. § 15A-

269(c). For the following reasons, we find no error and affirm the trial court's order.

I. Factual & Procedural History

On 13 April 2005, Defendant pled guilty, in accordance with a plea agreement, to robbery with a dangerous weapon, first degree rape, possession of a firearm by a felon, two counts of first degree sexual offense, crime against nature, first degree kidnapping, and felony possession of cocaine. The facts presented as a foundation for the plea tended to show the following.

On the evening of 27 April 2004, Penelope Jones ("Ms. Jones"),¹ an employee of the Days Inn Motel in Gastonia, reported that she had been robbed and sexually assaulted while working as the night shift clerk. Officers from the Gastonia Police Department responded to the scene and, after interviewing Ms. Jones, transported her to the hospital. There, hospital personnel collected DNA specimens from Ms. Jones and placed the specimens into a sexual assault evidence kit. Gastonia Police took custody of the sexual assault evidence kit and placed it into evidence at the police station.

Subsequent investigation led police to identify Defendant as a suspect, and Defendant's DNA was sent to the State Bureau of

¹ The victim's name has been changed to protect her identity.

Investigation ("SBI") for comparison with the DNA collected from the scene and from Ms. Jones' sexual assault evidence kit. A forensic biologist with the SBI analyzed the DNA samples and determined that the DNA profile obtained from Ms. Jones' thigh matched Defendant's DNA profile. The SBI analyst further found that the DNA profile obtained from Ms. Jones' vaginal swab was consistent with a mixture of DNA profiles of Ms. Jones and Defendant. The SBI analyst's report indicates that the DNA profile obtained from Ms. Jones' thigh is approximately "9.62 million trillion times more likely to be observed if it came from [Defendant] than if it came from another unrelated individual in the N.C. Black population."

On 17 May 2004, Defendant was indicted for robbery with a dangerous weapon, first degree rape, possession of a firearm by a felon, two counts of first degree sexual offense, crime against nature, and first degree kidnapping. On 13 April 2005, Defendant pled guilty to all crimes for which he was indicted, as well as an unrelated felony possession of cocaine charge. The trial court consolidated the convictions into two judgments and imposed consecutive active terms of imprisonment of 61 to 83 months and 275 to 339 months.

Eight years later, on 17 June 2013, Defendant filed a *pro se* "Motion for DNA Testing" in Gaston County Superior Court, citing N.C. Gen. Stat. §§ 15A-267, 268, 269, and 270. Defendant's motion alleges, *inter alia*, that "the ability to conduct the requested DNA testing is material to defendant[']s defense."

On 21 May 2014, Superior Court Judge Jesse B. Caldwell, III entered an order denying Defendant's motion for DNA testing without hearing. The trial court found that "the statutes Defendant/Petitioner cites relate to DNA testing *before* trial, and that no other legal basis exists to merit the Defendant/Petitioner's Motion[.]" Defendant's written notice of appeal was untimely filed on 16 June 2014; however, Defendant filed a petition for writ of certiorari with this Court on 13 October 2014. We allow Defendant's petition for writ of certiorari to address the underlying legal issues.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure, which provides for appellate review under the extraordinary writ of certiorari. "The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders

of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action." N.C. R. App. P. 21(a)(1).

III. Standard of Review

"Our standard of review of a denial of a motion for postconviction DNA testing is analogous to the standard of review for a motion for appropriate relief." *State v. Gardner*, ___ N.C. App. ___, ___, 742 S.E.2d 352, 354 (2013). Therefore, the lower court's "[f]indings of fact are binding on this Court if they are supported by competent evidence and may not be disturbed absent an abuse of discretion. The lower court's conclusions of law are reviewed *de novo*." *Id.*

IV. Analysis

On appeal, Defendant presents two arguments of error. First, Defendant argues that the trial court erred in concluding that Defendant's "Motion for DNA Testing" cited only statutes for pretrial DNA testing, and thus the trial court erred in denying Defendant's motion. Second, Defendant argues that the trial court erred in failing to consider his request for the appointment of counsel, in violation of N.C. Gen. Stat. § 15A-269(c). We address these arguments in turn.

A. Defendant's Motion for DNA Testing

Defendant cites N.C. Gen. Stat. §§ 15A-267, 268, 269, and 270 as the legal basis for his entitlement to DNA testing. He errs in part. The only statute relevant here is N.C. Gen. Stat. § 15A-269. The other statutes do not apply to this case. Section 15A-267 pertains to *pretrial* access to DNA samples from the crime scene. Section 15A-268 pertains to the preservation of biological evidence collected at the scene. Defendant's motion does not contend that the evidence in this case has been improperly preserved. Section 15A-270 pertains to post-test procedures after the trial court grants a motion for postconviction DNA testing. Therefore, we need only analyze Defendant's legal claims under N.C. Gen. Stat. § 15A-269, which addresses requests for postconviction DNA testing.

N.C. Gen. Stat. § 15A-269 provides:

(a) A defendant may make a motion before the trial court . . . if the biological evidence meets all of the following conditions:

(1) Is material to the defendant's defense.

(2) Is related to the investigation or prosecution that resulted in the judgment.

(3) Meets either of the following conditions:

- a. It was not DNA tested previously.
- b. It was tested previously, but the requested DNA test would provide results that are significantly more

accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.

N.C. Gen. Stat. § 15A-269 (2013). By the plain language of the statute, the burden is on the defendant to make the required showing under each subsection (1), (2), and (3) before the trial court. As in a proceeding for a postconviction motion for appropriate relief, "the moving party has the burden of proving by the preponderance of the evidence every fact to support his motion." *State v. Adcock*, 310 N.C. 1, 37, 310 S.E.2d 587, 608 (1983). Absent the required showing, the trial court is not statutorily obligated to order postconviction DNA testing. See *State v. Foster*, ___ N.C. App. ___, ___, 729 S.E.2d 116, 120 (2012); see also *State v. McLean*, ___ N.C. App. ___, ___, 753 S.E.2d 235, 239 (2014) (so holding in the context of pretrial motions for DNA testing).

With regard to the materiality element set forth in section (a)(1), we held in *State v. Gardner* that "where a motion brought under [subsection (a)(1)] provided no indication of how or why the requested DNA testing would be material to the petitioner's defense, the motion was deficient and it was not error to deny the request for the DNA testing." ___ N.C. App. at ___, 742 S.E.2d at

354 (2013); *see also Foster*, ___ N.C. App. at ___, 729 S.E.2d at 120. In *Gardner*, the defendant pled guilty to fifteen counts of statutory rape. *Gardner*, ___ N.C. App. at ___, 742 S.E.2d at 353. The trial court consolidated judgment and sentenced the defendant to 173 to 217 months imprisonment. *Id.* Eleven years later, the defendant filed a *pro se* motion for postconviction DNA testing. *Id.* In his motion, with regard to the materiality element, the defendant asserted only the conclusory statement that DNA testing would be material to his defense. *Id.* at ___, 742 S.E.2d at 356. This Court upheld the trial court's denial of the defendant's motion for postconviction DNA testing, holding that the defendant's burden of showing materiality requires more than a conclusory statement. *Id.*

This case is indistinguishable from *Gardner*. Here, Defendant's motion for DNA testing contains only the following conclusory statement regarding materiality: "The ability to conduct the requested DNA testing is material to defendant[']s defense[.]" This is the identical conclusory statement that was used by the defendants in *Gardner* and *Foster*. As in *Gardner* and *Foster*, we hold that Defendant's motion in this case is insufficient to satisfy his burden under N.C. Gen. Stat. § 15A-269. Because we find that Defendant failed to establish a

condition precedent to the trial court's authority to grant his motion (*i.e.*, materiality), we do not reach the State's argument that a defendant can never establish materiality for postconviction DNA testing after entering a guilty plea.

While the trial court correctly denied Defendant's motion for DNA testing, we recognize that the trial court's reasoning for reaching that conclusion was somewhat flawed. The trial court's order denying Defendant's motion states that "the statutes Defendant/Petitioner cites relate to DNA testing *before* trial, and that no other legal basis exists to merit the Defendant/Petitioner's Motion." This conclusion is erroneous, as Defendant's motion clearly cites N.C. Gen. Stat. § 15A-269 as one legal basis for his motion—a statute providing exclusively for requests for postconviction DNA testing. Nevertheless, because the trial court reached the correct conclusion—that Defendant's motion for DNA testing should be denied—we affirm its order. "[E]ven if dismissal was for the wrong reason, a trial court's ruling must be upheld if it is correct upon any theory of law, and thus it should not be set aside merely because the court gives a wrong or insufficient reason for [it]." *Templeton v. Town of Boone*, 208 N.C. App. 50, 54, 701 S.E.2d 709, 712 (2010) (internal quotation marks omitted); *see also Payne v. Buffalo Reinsurance*

Co., 69 N.C. App. 551, 555, 317 S.E.2d 408, 411 (1984) ("[A] judgment that is correct must be upheld even if it was entered for the wrong reason.").

Therefore, we affirm the result of the trial court denying Defendant's motion for DNA testing.

B. Defendant's Request for Appointment of Counsel

Defendant's second and final argument on appeal is that the trial court erred in failing to consider Defendant's request for the appointment of counsel pursuant to N.C. Gen. Stat. § 15A-269(c), which provides that

[i]n accordance with rules adopted by the Office of Indigent Defense Services, the court shall appoint counsel for the person who brings a motion under this section if that person is indigent. If the petitioner has filed pro se, the court shall appoint counsel for the petitioner in accordance with rules adopted by the Office of Indigent Defense Services upon a showing that the DNA testing may be material to the petitioner's claim of wrongful conviction.

N.C. Gen. Stat. § 15A-269(c) (2013). Defendant argues that, pursuant to this statute, the trial court should have either appointed him counsel or held a hearing to determine whether DNA testing "may be material to [his] claim of wrongful conviction." However, in *Gardner*, we rejected this identical argument. In *Gardner*, we held that "[a]ccording to the plain language of the

statute, a trial court is required to appoint counsel for a defendant bringing a motion under this section only if the defendant makes a showing (1) of indigence and (2) that the DNA testing is material to defendant's claim that he or she was wrongfully convicted.' " *Gardner*, ___ N.C. App. at ___, 742 S.E.2d at 355 (quoting *State v. Barts*, 204 N.C. App. 596, 696 S.E.2d 923, 2010 WL 2367302, at *1 (June 15, 2010) (unpublished)). Therefore, an indigent defendant must make a sufficient showing of materiality before he is entitled to appointment of counsel. *Id.* at ___, 742 S.E.2d at 355 ("[I]n order to support the appointment of counsel pursuant to N.C. Gen. Stat. § 15A-269(c), a convicted criminal defendant must make an allegation addressing the materiality issue that would, if accepted, satisfy N.C. Gen. Stat. § 15A-269(a)(1).").

Here, because we hold that Defendant has not met his burden of showing materiality under N.C. Gen. Stat. § 15A-269(a)(1), he is not entitled to the appointment of counsel, and the trial court did not err in failing to consider his request for counsel.

V. Conclusion

For the foregoing reasons, we affirm the order of the trial court denying Defendant's motion for DNA testing.

Affirmed.

Judges BRYANT and STROUD concur.